No. 14258.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a New York Corporation, and E. F. GRANDY, INC., a California Corporation,

Appellants,

vs.

AMERICAN SEATING COMPANY, a New Jersey Corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

I.

Appellee's Statement of Facts Contains Erroneous Statements Which Are Unsupported by the Record.

The "Concise Statement of Facts" which appears in the brief of Appellee commencing on page 2 contains two statements which heretofore have been made repeatedly in the trial court both of which are erroneous. Appellants made a detailed and accurate statement of facts with numerous references to the record and with adequate quotation of the record to fully disclose the true facts in the hope that Appellee would refrain from repeating these erroneous statements.

The first erroneous statement of fact appears at page 3 of Appellee's brief wherein it is stated that the specifications required V. L. Murphy, the subcontractor, to obtain certain material and equipment from Appellee. The fact is that the specifications do not require the equipment to be purchased from any particular source. So far as the specifications are concerned the equipment could be purchased from any person, firm or corporation manufacturing such material.

The second erroneous statement appears on the same page. Appellee asserts that the prime contractor, Grandy, Inc., forwarded the purchase order of V. L. Murphy to American Seating Company. This statement is likewise completely unsupported in the record. See page 8 of Appellant's Opening Brief for a full statement of facts regarding this matter, but to eliminate further discussion we quote the statement of counsel for Appellee which is binding upon Appellee as a part of the agreed statement of facts made in the trial court [R. 81]:

> "Mr. Green: *Under date of September 23, 1949, a purchase order was sent to American Seating Company by V. L. Murphy. A copy of it was sent to E. F. Grandy and received by them on September 24, 1949,* a photostat of that, with the stamp of the Grandy Company, which has been marked for identification as Plaintiff's Exhibit No. 7." (Italics ours.)

Except as above stated, there is nothing in Appellee's statement of facts which conflicts with the statement by Appellants.

II.

American Seating Was Adequately Protected by Miller Act Bonds. No Intention to Benefit It Appears From a Construction of the Subcontract and the Payment and Performance Bonds.

Passing for a moment Appellee's attempt to avoid the logical force of Appellant's argument by an effort to distinguish the instant case from those cited by Appellant, we first wish to examine the fundamental weakness of Appellee's argument. This is the ostrich-like refusal to recognize that the primary rule of interpretation of contracts is that effect must be given every provision thereof. The rule is the same whether the contract is one instrument or several instruments which must be read or construed together.

Civil Code, Sections 1641, 1642;

Crane Co. v. Borwick Trenching Corporation (1934), 138 Cal. App. 319, 32 P. 2d 387;

Beedy v. San Mateo Hotel Co. (1915), 27 Cal. App. 653, 150 Pac. 810;

Merkeley v. Fisk (1919), 179 Cal. 748, 178 Pac. 945.

12 Cal. Jur. 2d, *Contracts,* Section 123, pp. 333-335.

Thus, in the instant case, Appellee argues that the Performance Bond, the Payment Bond and the Subcontract must be read and construed together. Bearing in mind that when this is so, each must be so construed as to have a place in the entire picture and a meaning, can it be said of the fact that there are two bonds, a Performance Bond and a Payment Bond, instead of a single, all-purpose bond, "This alleged distinction requires no comment?" (Appellee's Br. p. 18.)

Construing all of the instruments together, it bluntly appears that the common-law bonds were required to protect Grandy, Inc. There is no evidence of solicitude for third parties, such as American Seating Company, which is perfectly capable of protecting itself. No duty to protect American Seating Company is imposed by law, except pursuant to the Miller Act (40 U. S. C., Secs. 270a and 270b). Appellee slept on these rights which are ample to protect a vigilant supplier of material and labor. The traditional attitude of contractors in this situation made mechanic's-lien laws and the Miller Act a necessity. If a supplier waives these rights, then he must take his own risks. There is less justice in making the contractor pay twice than there is in letting the supplier suffer his own credit risk. Appellee has neither equity nor sympathy on his side.

If, as Appellee contends, the Performance Bond "includes insurance of payment for labor and material furnished," of what use is the Payment Bond? Such a construction nullifies the value of the Payment Bond. How could the contractor suffer loss or damage from failure of his subcontractor to pay labor or materialmen if he was protected by "an insurance contract" that these would be paid? It is manifest that the argument of Appellee boils down to the idea that the Payment Bond was simply surplusage. We believe that this position is untenable.

The alternative is that the parties intended a division of function between the two bonds. The Performance Bond is silent as to payment. Can it be said that any feature of payment should be implied when there is a separate bond for that purpose? If none can be implied, there is none. Appellee does not contend for more than

an implication which is precluded in this case for the reasons stated.

One more point bears upon the subject of ascertaining the intention of the parties: The prime contract is one of the documents to be considered because it is incorporated by reference into the subcontract [R. 148]. The prime contract contains ample protection for Appellee and all like him because it requires a Miller Act bond. There is no reason to suppose that the contractor or his subcontractor should be further concerned about the welfare and protection of Appellee. But, by the same token, the contractor himself is subject to potential liability, not otherwise existent, by becoming a principal upon the Miller Act bond. His only reasonable concern is for himself, hence the Payment Bond is for his own protection.

III.

The Obligation of a Surety on a Performance Bond Depends Upon the "Intention" of the Parties Thereto as Ascertained From the Facts and Circumstances of Each Case.

The case of *Pacific States Co. v. U. S. Fidelity & G. Co.,* (1930) 109 Cal. App. 691, 293 Pac. 812, is not as broad as Appellee apparently believes. All of the language quoted by Appellee is predicated upon the Court's determination of what the parties *intended* by the contract and the undertaking. Having determined that these instruments clearly implied that it was *intended* that the bond was to assure payment for labor and materials as well as performance of the work, the consequences were clearly ordained.

We cited the later case of *Crane Co. v. Borwick Trenching Corporation* (1934), 138 Cal. App. 319, 32 P. 2d 387,

which adopted the same principle, that is to say, looked to the intention of the contracting parties, and came to a different result. It so happened that the language of the bonds in the respective cases differed and consequently the intention differed as did the result. Each case involved but a single bond. The intention of the parties in the case at bar is as clearly evidenced by the fact that there are two bonds of different functions as by a difference in language. Intention may be expressed in many ways.

Neither the *Pacific States* case nor the *Crane Co.* case, regardless of the language of the respective opinions, cast forever and in every circumstance a single construction upon words of the English language without regard for the surrounding circumstances which clearly indicate contrary intent. Both cases were cited by Appellant to illustrate the fact that intent governs. It is in reality the intent relative to the *surety bond* which must be determined and the other related documents are a part of the surety contract only to the extent that they aid in determining the scope of the surety's obligation.

The Appellee invites the Court's attention to the similarity in the wording of the Performance Bond in the instant case and the single, all-purpose bond in the *Pacific States* case. We respectfully invite the Court's attention to the differences and quote for convenience the provisions of the bond in the *Pacific States* case (109 Cal. App. 693):

> " 'The condition of this obligation is such that if said contract is made, and if the said contractor shall well

> and faithfully keep and perform all of the covenants and agreements of said contract, by them to be kept and performed, *and shall turn over and deliver to said General Contractor, said improvement according to said contract, and shall save and hold harmless the said general contractor from any and all loss or damage arising out of the failure of said contractor to fulfill said contract,* then the above obligation to be void; otherwise to remain in full force and effect.' " (Italics ours.)

This single bond is quite obviously all-purpose, including both performance and payment features, and containing the following further words which are foreign to both the Performance and Payment Bonds in this case:

> "and shall turn over and deliver to said General Contractor, said improvement according to said contract,"

These words, we think, indicate that the intention was to "turn over and deliver" free from liens which would follow a failure to pay for materials and labor since it was a private contract subject to the mechanic's lien laws of the State of California. A realistic appraisal of the language of the *Pacific States* decision must result in the conclusion that the matter of intention of the parties is to be determined by an appraisal of the facts and circumstances of each case and is not a rule of law.

IV.

Cases Cited by Appellants in Their Opening Brief Support the Principle That Intention Governs in the Interpretation of Surety Bonds and the Obligation Thereof and That Such Intention Is to Be Derived From the Facts and Circumstances of Each Case Rather Than by Reference to any Arbitrary Rule or Magic Formula of Words.

In pages 5 through 15 of its brief, Appellee attempts to distinguish cases cited by Appellants in support of the principle that the intention of the parties, as evidenced by the facts and circumstances of each case, governs the interpretation of surety bonds in determining the parties who are to be benefited thereunder.

A brief review of these cases will show that none of them are inconsistent with Appellants' contention.

Crane Co. v. Borwick Trenching Corporation (1934), 138 Cal. App. 319, 32 P. 2d 387, involved a single common-law performance bond. The court looked to the facts and circumstances and found that the parties did not intend to benefit a third party materialman and, therefore, he could not recover from the surety. The court in the *Crane Co.* case distinguished *Pacific States Co. v. United States F. & G.* (1930), 109 Cal. App. 691, 293 Pac. 812, on the ground that the language in the bond there involved was more inclusive than that contained in the bond involved in the other case. Therefore, the *Pacific States* case cannot be regarded as authority for the proposition that use of similar language in one part of a bond always requires the same result, especially where, in addition, there are other differences in language of the respective bonds which must be considered and particularly where there is in addition a payment bond.

In attempting to distinguish *Lamson Co., Inc. v. Jones* (1933), 134 Cal. App. 89, 24 P. 2d 845, Appellee assumes too much (Appellee's Br. 1st par. p. 10).

That case is completely consistent with Appellants' contention here: Where a statutory bond is given for the protection of laborers and materialmen, it is a circumstance to be considered in determining the intention of the parties with respect to a common-law bond, and whether or not they intended its benefits to inure to third parties, not privy thereto. The court in that case decided that where the materialmen and laborers were protected by another bond which happened to be a statutory bond, there was no intention to benefit them by the common-law performance bond and, therefore, they could not maintain suit thereon.

Appellee states (Appellee's Answering Br. p. 8), that the bonds in the instant case meet the test set forth in *Ryan v. Shannahan* (1930), 209 Cal. 98, 104, 285 Pac. 1045, and in the *Pacific States* case. But the *Ryan* case sets forth no particular test other than ascertaining the *intention* of the parties, and the latter case was in later decisions held to turn upon the particular language of the bond under consideration.

Appellee uses several pages to distinguish *Ramey v. Hopkins* (1934), 138 Cal. App. 685, 33 P. 2d 433. (See Appellee's Answering Br. pp. 11-14.) We cited the *Ramey* case to show the distinction, as set forth in Section 2778, California Civil Code, between a bond against liability and an indemnity bond against loss or damage. The question in that case was whether or not the obligee of the indemnity bond against loss or damage might recover from the indemnitor without proving payment of loss or dam-

age, and the court held that it could not. Cases relied on by respondent in the *Ramey* case to support a contrary conclusion dealt with bonds against liability rather than against loss or damage and were distinguished by the court on that basis.

The *Ramey* case and the case of *United States v. United States Fidelity & Guar. Co.* (2 Cir., 1940), 113 F. 2d 888, illustrate why payment bonds, such as are here involved, are furnished. As stated in *United States v. United States Fidelity & Guar. Co., supra,* at page 891:

> "To give the language any meaning it must be construed to refer to such claims as are provable under the Miller Act bond furnished by the obligee. Such was the construction adopted in American Surety Co. v. Wheeling Structural Steel Co., D. C. W. Va., 26 F. Supp. 395, 400. Accordingly, Foley and his bondsman are liable for any loss suffered by Fiumara by reason of claims provable under the Miller Act bond. We agree with the appellee that the mere existence of liability to Warren Corporation would not suffice, for the bond appears by its terms to provide only for indemnity against loss."

It is, therefore, submitted that these cases support Appellants' contentions in this case.

The cases cited adequately demonstrate that the function of the court in a case of this kind is to ascertain the intent of the parties with respect to whether or not materialmen and laborers were intended to be benefited.

V.

A Joint Judgment Against the Surety and Prime Contractor Is Erroneous.

This point is responsive to Appellee's point "C" commencing on page 19 of its brief. In citing Section 2777 of the Civil Code of the State of California in support of a joint judgment against Appellants, Appellee seems to be confused. The section is inapplicable to the principal, surety and obligee relationship. If the principal or surety is liable so is the other. This in no way affects the liability of the obligee. Appellant Grandy, Inc., is the obligee.

Appellee is further confused in asserting that E. F. Grandy, Inc., is a nominal appellant. Each of appellants assert that neither is liable and each asserts that if the other is liable it is not. Nothing could be more clear and the separate and adverse, although consistent, position of each appellant is easily perceived. The surety most certainly does not concede that it is liable at all, ultimately, or otherwise. In addition, the surety asserts that it is not liable until Grandy, Inc., suffers loss or damage. That is the contract.

Now, surely Appellee does not contend that the District Court of Appeal of the State of California, which decided the case of *Ramey v. Hopkins,* 138 Cal. 685, 33 P. 2d 433, in 1936, or the United States Circuit Court of Appeals which decided the case of *United States v. U. S. F. & G. Co.,* 113 F. 2d 888, in 1940, are courts of "the early days of the common law." Both of these cases support Appellant's contentions and were cited in the opening brief.

The language of California Civil Code, Section 2777, is easy to understand, but the language of *Fidelity & Deposit Company of Maryland v. Pittman* (1936), 52 Ga. App. 394, 183 S. E. 572, quoted in italics added by Appellee on page 21 of its brief, is exceptionally clear.

> "The subcontractor's bond is a joint and several obligation of the subcontractor and the surety."

We have been pointing out that Appellee sued the *prime contractor,* not the subcontractor. Grandy, Inc., is the *prime contractor* and the *obligee.* There is no principle even suggested by Appellee as to how the *prime contractor obligee* could possibly be liable jointly with the subcontractor's surety.

As a part of the point under discussion Appellee propounded two questions at page 21 of its brief, the answers to which appear in Appellants' opening brief at page 26 and have so often since been mentioned that further discussion would be an imposition. The reasons which Appellee assigns for the Payment Bond are imaginative and unreal and unsupported by the record. So also is the assertion that Grandy, Inc., covenanted with the Government to pay for all materials furnished.

Completely detached in reason and logic is the statement next following that persons who supply materials and labor to Grandy, Inc., may sue Grandy, Inc., therefor. Appellee forgets that it furnished materials and labor to V. L. Murphy, the subcontractor, and not to Grandy, Inc. California Civil Code, Section 1559, and *W. P. Fuller & Co. v. Alturas School District* (1915), 28 Cal. App. 609, 163 Pac. 743, cited by Appellee under this point, refers to third party beneficiary contracts and are so far out of context respecting the problem of joint liability of Appellants as to be meaningless.

VI.

No Contractual Relationship Between Appellants and Appellee Is Alleged or Proved.

This point is responsive to point "D" of Appellee's brief commencing on page 22 thereof. The quotation of paragraph VI of the Complaint exemplifies Appellants' contention that there are no allegations of a contractual relationship in the Complaint. Appellee is correct in stating that the Complaint need only allege the ultimate facts of contractual relationship, but these are conspicuous by their absence. Appellee points to neither evidence nor findings to meet the objections raised by Appellants.

Never before has it been suggested that it is the implied in-law duty of a prime contractor to either pay the materialmen of his independent subcontractor, or furnish a bond to guarantee such payment. Likewise, the concept that the recipient of a purchase order makes an offer thereby is new to the law. No comment is required.

Appellee asserts that the finding that there is a contract implies an offer and acceptance and hence no more particular finding is necessary. We wish to point out that this depends upon whether the contract found is express or implied. Appellants are at least entitled to this information in the findings. It also begs the question to say that consideration appears from the fact that the material was furnished. Appellants are entitled to a finding as to whom the goods were furnished, which would disclose that they went to V. L. Murphy, not to either Appellant. In the same category is the assertion that it was unnecessary to find that Grandy, Inc., requested the materials since it was delivered to the job for which Grandy, Inc., was the prime contractor. These assertions of Appellee

emphasize the contention of Appellants that the findings are vague, uncertain and insufficient.

But of all, the most startling statement appears upon page 26 of Appellee's brief. It is refuted by simple repetition:

> "There is always an implied agreement to pay for goods *furnished to another* for the purpose of completing a contract for which he (the contractor) expects to be paid." (Italics ours.)

The *Pacific States* case is not authority for this proposition nor does any exist.

Conclusion.

Appellee concedes an error in computation of interest (see its brief, page 27) and in the amount of the judgment, since on page 25 it concedes that the contract price was the reasonable worth and value of the materials, to wit: $6,124.37. Appellants further believe that other errors have been disclosed which present no alternative to reversal with instructions to enter judgment for Appellants.

Respectfully submitted,

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